2.1 Sexual Harassment—*Quid Pro Quo*[25]

[Updated: 8/16/02]

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of sexual harassment[26] in violation of federal law. Specifically, [she/he] claims that [specify the *quid pro quo*] and that [defendant] took adverse tangible employment action against [her/him] for refusing.[27] In order to succeed on this claim, [plaintiff] must persuade you by a preponderance of the evidence that:

> First, [she/he] was subjected to unwelcome sexual advances that were sexually motivated because of [her/his] sex[28]; and
> Second, [her/his] rejection of the advances affected a tangible aspect of [her/his] employment—in other words, that were it not for [her/his] rejection of the advances,[29] [she/he] would not have been [specify adverse action].

An advance is unwelcome if it is uninvited and offensive or unwanted.[30]

Even if you were to decide that the [specify adverse action] was neither fair nor wise nor professionally handled, that would not be enough.[31] In order to succeed on the sexual harassment claim, [plaintiff] must persuade you, by a preponderance of the evidence, that were it not for [her/his] rejection of the advances,[32] [she/he] would not have been [specify adverse action].

[Plaintiff] need not show that [her/his] rejection of the advances was the only or predominant factor[33] that motivated[34] [defendant]. In fact, you may decide that other factors were involved as well in [defendant]'s decisionmaking process. In that event, in order for you to find for [plaintiff], you must find that [she/he] has proven that, although there were other factors, [she/he] would not have been [specify adverse action] without [her/his] rejection of the advances.

[35]{[Plaintiff] is not required to produce direct evidence of unlawful motive. You may infer knowledge and/or motive as a matter of reason and common sense from the existence of other facts—for example, explanations that were given that you find were really pretextual. "Pretextual" means false or, though true, not the real reason for the action taken.}

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[25] Although the Supreme Court has warned against over-emphasizing the *quid pro quo* / hostile environment distinction, the formulation is still useful in determining the type of charge to be given:

> We do not suggest the terms quid pro quo and hostile work environment are irrelevant to Title VII litigation. To the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998) (Title VII) (Kennedy, J.).

[26] This instruction should be used in cases where the defendant suffered an adverse tangible employment action because he or she refused unwanted sexual advances. If the plaintiff did not suffer an adverse tangible employment action, then Instruction 2.2 or 2.3 should be used.

[27] In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (Title VII) (Kennedy, J.), the Court held that an employer is strictly liable for sexual harassment by an employee in a supervisory position if the plaintiff suffered a tangible employment action as a result of refusal to submit to sexual harassment. Id. at 761-62 ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relationship.").

The Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Id. at 761. It is not clear whether the term "tangible employment action" (as used by the Court in Ellerth) is synonymous with the term "adverse employment action," the term commonly used in employment discrimination cases. See Fierros v. Texas Dep't of Health, 274 F.3d 187, 192 n.2 (5th Cir. 2001) (Title VII) (King, C.J.) (discussing whether Ellerth's definition of "tangible employment action" expanded the definition of "adverse employment action" used in Title VII retaliation claims). The terms serve two different purposes. The Ellerth Court used the term tangible employment action to describe an indicator of employer endorsement of and thus culpability for the actions of an employee, a surrogate for the more complicated agency analysis. Adverse employment action, on the other hand, is used to describe an injury or harm requirement the plaintiff must demonstrate. Other than one passing reference, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258 (1st Cir. 1999) (Title VII and ADA) (Selya, J.), the First Circuit has not yet used the term "tangible employment action."

[28] The harasser need not be of the opposite sex to the victim; same-sex harassment is also actionable. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998) (Title VII) (Scalia, J.); see also Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258-59 (1st Cir. 1999) (Title VII and ADA) (Selya, J.). The essential issue is whether the victim was harassed "because of" his or her sex.

[29] The causation language in this instruction is drawn from the pretext model because it is the most common model for a *quid pro quo* case. In a case where the mixed motive model is appropriate, the causation language from Instruction 1.2 should be used.

[30] This definition comes from Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (Title VII) (Cyr, J.). Whether a particular advance was unwelcome is a fact-intensive, context-specific inquiry. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (Title VII) (Rehnquist, J.) ("the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact"). The fact that the plaintiff did not explicitly reject the advance is not necessarily dispositive. Chamberlin, 915 F.2d at 784 ("[T]he perspective of the factfinder evaluating the welcomeness of sexual overtures . . . must take account of the fact that the employee may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint, though normally advisable, may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm.").

There is some uncertainty in the First Circuit about the weight the fact finder should give to the respective perspectives of the person making the advance and the person receiving it. For a discussion of this issue, see Harris v. International Paper Co., 765 F. Supp. 1509, 1513-16 (D. Me.) (Title VII) (Carter, C.J.) vacated in part by 765 F. Supp. 1529 (1991) (discussing Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) (Title VII) (Cyr, J.); Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186 (1st Cir. 1990) (Title VII) (Torruella, J.); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (Title VII) (Bownes, J.)).

[31] Thomas v. Eastman Kodak Co., 183 F.3d 38, 64 (1st Cir. 1999) (Title VII) (Lynch, J.) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1996)) (Title VII) (Stahl, J.) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision."); see also Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 8 (1st Cir. 2000) (Title VII) (Lipez, J.) (proof that decision is unfair "is not sufficient to state a claim under Title VII"); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 22 (1st Cir. 1999) (Title VII) (Torruella, C.J.) ("Title VII does not stop a company from demoting an employee for any reason—fair or unfair—so long as the decision to demote does not stem from a protected characteristic." (citations omitted)); Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (ADEA) (Selya, J.) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business

decisions." (citations omitted)).

[32] Case law talks about the "true reason," "determining factor," "determinative factor" and "motivating factor," sometimes using the definite article "the" and sometimes using the indefinite article "a." The debate recalls causation analysis in tort law with many of the same ambiguities. What does seem clear, however, is that "but for" causation is the standard in pretext cases. Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 332 (1st Cir. 1997) (ADEA) (Stahl, J.) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991) (ADEA) (Selya, J.)); see also Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (Title VII) (Lynch, J.) ("The ultimate question is whether the employee has been treated disparately 'because of [the protected characteristic].'"); Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (Title VII) (O'Connor, J., concurring) ("Thus, I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do."); Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 38 (1st Cir. 2000) (ADA) (Torruella, C.J.) (describing the analysis of whether the plaintiff was fired "because of" his disability as "but/for reasoning"). We have therefore chosen to avoid the listed terms, which seem to provoke endless debate in charge conferences, and use a simple "but for" instruction (the actual words "but for" are not used because they are far less familiar to lay jurors than to lawyers and judges). We thereby avoid the debate over those terms as reflected in the following case law: Provencher v. CVS Pharmacy, 145 F.3d 5, 10 (1st Cir. 1998) (Title VII retaliation) (Coffin, J.) ("a motivating factor" and "played a part" are problematic phrases; defendant is liable only if discrimination is "the determinative factor"); Carey v. Mt. Desert Island Hospital, 156 F.3d 31, 38-39 (1st Cir. 1998) (Title VII) (Coffin, J.) (The First Circuit has not yet decided whether "the 'a motivating factor' language in 42 U.S.C. § 2000e-2(m) applies to all discrimination cases" or only to mixed motive cases.); id. at 46 (Stahl, J., dissenting) ("[A] district court errs by giving a jury instruction pursuant to § 2000e-2(m) [e.g., 'a motivating factor' language], unless the court determines that the plaintiff has adduced evidence of discrimination sufficient to take the case outside the McDonnell Douglas paradigm. . . ."); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 542 (1993) (Title VII) (Souter, J., dissenting) ("Congress has taken no action to indicate that we were mistaken in McDonnell Douglas and Burdine.").

[33] See Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (Title VII) (Coffin, J.) (instruction "requiring [a verdict for the defendant] if *any* reason other than gender played, however minimal, a part" in the challenged employment decision places too heavy a burden on plaintiff); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) (ADEA) (O'Connor, J.) ("Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the *predominant*, rather than a determinative, factor in the employment decision." (emphasis added)).

[34] Although there is dispute about the propriety of the use of the term "a motivating factor," the First Circuit does not appear to be troubled by the word "motivated" when used by itself. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 35 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (citing Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000) (Title VII) (Wallace, J.) ("termination was motivated by [protected characteristic] discrimination")).

[35] The pretext language used in this bracketed paragraph is permissible and may help the jury understand the issue, but is not required in the First Circuit. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000) (ADEA and ADA) (Boudin, J.) ("While permitted, we doubt that such an explanation is compulsory, even if properly requested."); White v. New Hampshire Dept. of Corrections, 221 F.3d 254 (1st Cir. 2000) (Title VII) (Bownes, J.) (finding no error in refusal to give explicit instruction on pretext); see also Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 790 n.9 (8th Cir. 2001) (Title VII) (Bowman, J.) ("We do not express any view as to whether it would ever be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."); Palmer v. Board of Regents of the Univ. Sys. of Ga., 208 F.3d 969, 974-75 (11th Cir. 2000) (Title VII) (Barkett, J.) (no reversible error in refusal to give pretext instruction); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (ADEA) (Easterbrook, J.) (same). But see Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (Title VII and section 1981) (Holloway, J.) ("[I]n cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may-- but need not--infer that the employer's true motive was discriminatory."); Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994) (section 1981) (Newman, C.J.) (same); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (ADEA) (Sloviter, J.) (same).